1991

AOK Lands Inc. v. Shand, Morahan & Company, and Mutual Fire, Marine & Inland Insurance Co. : Brief of Appellee

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

AOK LANDS, INC.,	:	
Plaintiff and Appellant,	:	Supreme Court No. 910477
vs.	:	Priority No. 16
SHAND, MORAHAN & COMPANY, and MUTUAL FIRE, MARINE & INLAND INSURANCE CO.,	:	
Defendants and Appellees.	:	

BRIEF OF APPELLEES, SHAND MORAHAN & COMPANY AND MUTUAL FIRE, MARINE & INLAND INSURANCE CO.

APPEAL FROM A JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH

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LIST OF ALL PARTIES TO THE ACTION

The caption of this case contains the names of all parties to the action.

JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. §78-2-2(3)(j) (1992 Replacement Volume).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

A. ISSUES.

The following issues are presented for review:

1. Are "claims made" insurance policies (as distinguished from "occurrence" type polices) invalid in Utah on public policy grounds where such policies are used to provide professional liability coverage?

2. Even if a claim had been made during the policy period of the professional liability policy in question, is coverage properly denied where timely notice of the claim was not given to the insurance company under the circumstances of this case?

B. STANDARD OF REVIEW.

The Supreme Court should view the facts in a light most favorable to the appellant. No deference is given to the trial court's conclusions of law; those conclusions are reviewed for correctness. Blue Cross and Blue Shield v. State, 779 P.2d 634 (Utah 1989).

C. CONSTITUTIONAL PROVISIONS AND STATUTES WHOSE INTERPRETATION IS DETERMINATIVE.

None.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE TRIAL COURT.

In an earlier case, plaintiff/appellant, AOK Lands, Inc. ("AOK"), obtained a $400,000 judgment against Utah Title and Abstract Company ("Utah Title"). Utah Title had formerly been insured under two successive one-year errors and omissions policies issued by defendant/appellee Mutual Fire, Marine & Inland Insurance Company ("Mutual Fire"), acting through its agent, defendant/appellee Shand, Morahan & Company ("Shand Morahan"). AOK then commenced this action, claiming that it is entitled to recover the policy limits from defendants in partial satisfaction of AOK's judgment against Utah Title.

The trial court granted defendants/appellees' motion for summary judgment, finding that there is no issue as to any material fact and that the defendants are entitled to judgment as a matter of law on both of the grounds set forth in defendants' motion: (1) that plaintiff's claim against Utah Title was not made until after the "claims made" insurance policies issued by defendants had expired and that said claim was therefore not covered under the policies, and (2) that defendants were prejudiced by not having been provided with timely notice of plaintiff's claim against Utah Title as required by the policies and that said claim was, for that reason also, not covered by the policies. All claims of plaintiff

as set forth in the complaint were therefore dismissed with prejudice. (Order and Judgment of the trial court, Record at 169-70. Said Order and Judgment are attached hereto in the Addendum.)

B. STATEMENT OF FACTS.

The following facts were set forth in the lower court in the Memorandum in Support of Defendants' Motion for Summary Judgment. (Record at 28-32.) None of these facts was controverted by plaintiff in its Response to Defendants' Motion for Summary Judgment. (Record at 86-88.)

1. Mutual Fire, acting through its agent, Shand Morahan, issued two successive errors and omissions insurance policies to Utah Title. The first policy was for the one year period from February 5, 1976 to February 5, 1977, and the second policy was for the one year period of February 5, 1977 to February 5, 1978. (Defendants' Answer to Plaintiff's Interrogatory No. 1, Record at 41-43. Those two insurance policies are attached as Exhibits "A" and "B" to Defendants' Response to Plaintiff's Interrogatories and Request for Production of Documents. Record at 48-56 (first policy) and 57-65 (second policy). Those two policies are also included as the last two documents in the Addendum which is attached to the Brief of Appellant.)

2. Each of the two insurance policies was a "claims made" policy. Each policy states: "This policy applies to CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD arising from professional services performed . . . ." (Emphasis in original.) In the second policy (which is the one closest in time

to the occasion when plaintiff later made a claim against Utah Title) that language appears toward the bottom of the third page of that policy. (Record at 59.) That page is a one page "Endorsement" which is entitled "AMENDMENT - THE COVERAGE." Even though that one page endorsement modified several provisions of the section entitled "The Coverage" in the main body of the policy, that Endorsement did not make any change in the "CLAIMS MADE" language quoted above. That same language therefore appears also in the main body of the policy, in paragraph 1 under the heading "The Coverage." (Record at 62.)

3. Plaintiff alleges that Utah Title committed a negligent act in December 1977 in handling a real estate transaction, causing damage to plaintiff, but plaintiff did not discover Utah Title's negligence until June or July 1979 and did not file a complaint against Utah Title until December 1979. Thus plaintiff did not make a claim against Utah Title until some time between June 1979 and December 1979. (Paragraphs 4 and 5 of Plaintiff's Complaint in this present action [Record at 1-2], and Plaintiff's Answer to Defendants' Interrogatory No. 1. [Record at 67].) Plaintiff further admitted these facts in Plaintiff's Response to Defendants' Motion for Summary Judgment. (Record at 86-87.)

4. Therefore, plaintiff's claim against Utah Title was not made until 16 to 22 months after the February 5, 1978 expiration date of the second "claims made" policy.

5. In the one page Endorsement (referred to in paragraph

2 above) to the second policy, it is also stated that "it is a condition precedent to coverage under this policy that all claims be reported in compliance with the provisions of section CLAIMS 1 - Notice of Claim or Suit." (Record at 59.) And in that section in the body of the policy under the heading "Claims" it is stated:

> 1. Notice of claim or suit: The Insured shall, as a condition precedent to their right to the protection afforded by this insurance, give to the Company as soon as practicable, notice
>
> (a) of any claim made against them
>
> . . . .
>
> In the event claim is made or suit is brought against the Insured, the Insured shall IMMEDIATELY forward to the Company every demand, notice, summons or other process received by him or his representatives.

(Record at 63-64; emphasis in original.)

6. Even though plaintiff's claim against Utah Title was made by December 1979, when plaintiff filed its complaint against Utah Title, neither Utah Title nor plaintiff nor anyone else ever gave notice to Mutual Fire (the insurer) nor to Shand Morahan (which was Mutual Fire's agent in handling claims) until June 1988 when plaintiff's counsel, Mr. Echard, sent to defendant Shand Morahan a letter dated June 3, 1988 in which he gave notice to defendants (1) of Utah Title's 1977 negligence, (2) of plaintiff's action against Utah Title commenced in 1979, and (3) of plaintiff's 1988 judgment against Utah Title, and demanded that defendants pay the policy limits toward that judgment. That notice to defendants was thus not given until eight years of litigation, including two trials, had transpired between plaintiff and Utah Title, and plaintiff had recovered a $400,000 judgment against Utah Title.

(Letter dated June 3, 1988 from Robert A. Echard to Shand Morahan attached as an exhibit to plaintiff's Response to Defendants' First Set of Interrogatories and Request for Production of Documents [Record at 67, 76]; Affidavit of George M. Grulke [Record at 77-82]); paragraph 5 on page 3 of Plaintiff's Response to Defendants' Motion for Summary Judgment [Record at 86, 88]. The Affidavit of Mr. Grulke is attached hereto in the Addendum.

Because plaintiff, in its Response to Defendants' Motion for Summary Judgment (Record at 86-88) did not contest any of the foregoing facts which were set forth in the Memorandum in Support of Defendants' Motion for Summary Judgment (Record at 28-32), plaintiff is deemed to have admitted those facts pursuant to Rule 4-501(2)(b) of the Utah Code of Judicial Administration, which states: "All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement." Rule 56(e) of the Utah Rules of Civil Procedure also provides that a party against whom a motion for summary judgment has been made, must, in his response, "set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

C. SUMMARY OF ARGUMENTS.

1. An "occurrence" type of policy generally provides coverage for a negligent act committed during the policy period, no matter when the claim is brought. In contrast, a "claims made"

policy covers claims made during the policy period, regardless of when the negligent act was committed. The policies involved in the instant case were clearly claims made policies that covered "claims first made against the insured during the policy period". The claim made by plaintiff against the insured, Utah Title, was not made until 16 to 22 months after the policy had expired, and those claims are therefore not covered by the policy.

2. The validity of claims made policies has been upheld by numerous courts. The plaintiff has not cited a single case in which a court has held invalid a typical claims made insurance policy (the type of policy involved in the instant case).

3. The claims made policy is now the form of insurance generally used to provide malpractice coverage to professionals. In the professional malpractice area, negligent acts are often not discovered until years later, and the use of "occurrence" policies therefore leads to a long tail of exposure for insurance companies that makes it difficult to calculate risks and premiums. The use of claims made policies has stabilized the market in errors and omissions coverage. If claims made policies (limiting coverage to claims made during the policy period) were held to be invalid (as urged by plaintiff/appellant) there could be serious repercussions in the insurance industry in this state and uncertainty as to the continued availability of malpractice insurance for professionals.

4. Utah cases cited by plaintiff in which statutes of repose have been held unconstitutional based on the open courts clause of the Utah Constitution (Article I, Section 11), are not

applicable to claims made insurance policies.

5. The insurance policies in question provided that as a "condition precedent" to the insured's right to the protection of the policy, the insured shall give notice to the company "as soon as practicable" of any claim made against the insured, and in the event suit is brought the insured shall "immediately forward to the company" the summons and other suit documents received by the insured. In this case the insured (Utah Title) never gave notice to the company of plaintiff's claim against Utah Title. The only notice the company (the defendants herein) ever received was from plaintiff's attorney, and that notice was not given until more than eight years after the plaintiff's claim was made against the insured and not until after the plaintiff had recovered judgment against the insured (after eight years of litigation and two trials). Under the Utah case of Busch Corp. v. State Farm Fire & Cas. Co., 743 P.2d 1217 (Utah 1987), there was no coverage under the policy because of failure to comply with the notice provision and the obvious prejudice to the insured resulting from such failure.

ARGUMENT

I. BY THE PLAIN LANGUAGE OF THE POLICY, THERE IS NO COVERAGE OF PLAINTIFF'S CLAIM AGAINST UTAH TITLE.

Nothing would seem to be more clear than the conclusion that if a policy states that it only covers claims made during the policy period, then claims made after the policy period are not covered. Because it is so obvious, one would not expect to find

much litigation on the subject. Nevertheless, there are some cases where former insureds have devised a variety of arguments in an attempt to extend coverage beyond the time clearly established in the policy. An example is Stine v. Continental Cas. Co., 349 N.W.2d 127 (Mich. 1984), where plaintiff Stine, an architect, had been insured under two successive one year errors and omissions policies. Those policies covered his negligent acts "provided that claim therefor is first made against the insured during this policy period and reported in writing to the Company during this policy period or within 60 days after the expiration of this policy period." (349 N.W.2d at 129; emphasis in original.)

Over two years after the termination date of the second policy, Stine was sued for negligent acts that may have occurred during the period that his insurance was in force, and Stine promptly gave notice to the insurance company of the suit and requested that the company defend him. The company refused to do so because the claim was not made during the policy period as required by the "claims made" provision of the policy. Stine then filed a declaratory judgment action, seeking to compel the company to defend him.

Stine argued that even though he had not given the company notice of the claim against him within sixty days after the expiration of the policy period as required by the policy, his failure to give notice was excused by a Michigan statute that provided that "failure to give any notice required to be given by such policy within the time specified therein shall not invalidate

any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible." (349 N.W.2d at 129, footnote 1.)

The insurance company's response was that it was denying coverage, not because of the timeliness of Stine's notice of the claim against him, but because "by its terms, the policy provided no coverage for claims made against the insured after the expiration of the policy period." (349 N.W.2d at 129.)

The Michigan Supreme Court, in a unanimous opinion, rendered judgment for the insurance company. The court distinguished between a "claims made" policy and an "occurrence" policy as follows:

> As a general proposition . . . a "discovery" or "claims made" policy is one in which indemnity is provided no matter when the alleged . . . negligence occurred, provided the misdeed complained of is discovered and the claim for indemnity is <u>made</u> against the insurer during the policy period.
>
> An "occurrence" insurance policy, on the other hand, generally is one in which indemnity is provided no matter when the claim is brought for the misdeed complained of, provided it occurred during the policy period.
>
> . . . .
>
> Or, as the United States Supreme Court put it:
>
> > "An 'occurrence' policy protects the policy holder from liability for any act done while the policy is in effect, whereas a 'claims made' policy protects the holder only against claims made during the life of the policy." (Citation omitted.)

(349 N.W.2d at 130-31; emphasis in original.) The court ruled that in accordance with the plain language of the policy, it provided coverage only for a claim made against the plaintiff Stine during the policy period. Because the claim was made after the policy period, there was no coverage. Accord, Safeco Title Ins. Co. v. Gannon, 774 P.2d 30 (Wash. App. 1989).

Plaintiff herein argues that the six year statute of limitations on written contracts (Utah Code Ann. §78-12-23(2)) and/or the four year statute of limitations on negligence actions (Utah Code Ann. §78-12-25) should apply to the claims made policy in question. Plaintiff then states: "Consequently, a claim for negligence or a claim on a written insurance policy could be maintained within four years or six years. The lawsuit of the appellant against Utah Title and Abstract Company was filed within two years from the date of the insurance policy and the negligent act." (Plaintiff/appellant's Brief at 8.)

However, plaintiff's lawsuit that was dismissed was not his suit against Utah Title, but his suit against Shand Morahan and Mutual Fire, and that latter suit was not commenced within four years nor even within six years "from the date of the insurance policy and the negligent act." All that is beside the point, however. Plaintiff's suit against these defendants was not dismissed because he filed his cause of action too late; it was because, as a matter of law, he never had a cause of action under the insurance contract. Because the insurance policy provided no coverage of plaintiff's claim against Utah Title, it doesn't matter

when plaintiff filed his suit; it still should be dismissed as a matter of law.

The two insurance policies in the instant case were "claims made" policies that clearly do not provide coverage for any claim that was first made after the policy period. Because plaintiff's claim against Utah Title was not made until 16 to 22 months after the last policy expired, that claim is not covered by either policy. Therefore, defendants have no liability either to the former insured, Utah Title, or to plaintiff, who is the judgment creditor of Utah Title.

II. "CLAIMS MADE" INSURANCE POLICIES (AS DISTINGUISHED FROM "OCCURRENCE" TYPE POLICIES), AS USED TO PROVIDE PROFESSIONAL LIABILITY COVERAGE, SHOULD NOT BE HELD INVALID IN UTAH ON PUBLIC POLICY GROUNDS.

A. Cases Dealing With Claims Made Policies.

As discussed below, numerous cases in numerous jurisdictions have upheld the validity of claims made insurance policies. The only case cited by plaintiff that held that there was coverage under a "claims made" liability policy where the claim was not made until after the policy expired is Sparks v. St. Paul Ins. Co., 495 A.2d 406 (N.J. 1985) (discussed on pages 18-23 of Plaintiff/Appellant's Brief). But that case dealt with an unusual type of claims made policy (which was a professional liability policy issued to an attorney) that was much more restrictive than the standard claims made policy because it excluded coverage for any act of negligence occurring before the date that the insurance company issued its first policy to the attorney. The court

observed that "unlike the standard 'claims made' policy . . . St. Paul's policy provided no retroactive coverage whatsoever during its first year." (Sparks, supra at 408.) The policy thus "combines the worst features of 'occurrence' and 'claims made' policies and the best of neither." (Id. at 414.)

That Sparks case has very limited application as evidenced by the fact that the same court - the New Jersey Supreme Court - on the same day it decided the Sparks case, also decided the case of Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395 (N.J. 1985), in which the court upheld a more typical type of claims made policy. The plaintiff, Zuckerman, was an attorney who had been insured under a professional liability policy whose coverage was limited to "claims made against the insured and actually communicated to the company during the policy period." Id. at 396. (That policy was therefore more restrictive in coverage than the policy in the instant case, which does not require that the claim be communicated to the company during the policy period but only that it be communicated "as soon as practicable." Of course the claim itself needs to have been made against the insured during the policy period.) Ten months after the policy expired, Zuckerman notified the insurance company of a claim that had been made against him, but the company denied coverage. Zuckerman brought suit to compel the company to indemnify him, but the court decided the case in favor of the insurance company, holding that there were no considerations of public policy that should prevent the "claims made" limitation in

the policy from being enforced literally, and that the carrier was therefore relieved from liability when notification of a claim was not given until after the policy expired.

The court noted that, unlike the Sparks case, the policy in Zuckerman provided broad retroactive coverage - it covered negligent acts committed even before commencement of the policy, subject only to the standard exception (which the court described as reasonable) of prior conduct which the insured knew, or could have reasonably foreseen, might lead to a claim or suit. (Zuckerman, supra at 403.) The court observed that "in the vast majority of cases in which 'claims made' policies have been challenged, their validity has been upheld by both federal and state courts. Many courts have explicitly held that 'claims made' policies do not offend public policy." (Id. at 400; citations omitted; emphasis added.)

The plaintiff in Zuckerman argued (similar to the arguments made by plaintiff in the instant case) that "on public policy grounds the [policy's] coverage limitations should not strictly be enforced absent appreciable prejudice to respondent because of the late notification." (Id. at 404.) The court rejected that argument, pointing out that cases which excuse an insured in giving late notice of a claim to the insurance company deal with occurrence type policies, where the notice requirement does "not define the coverage provided by the policy but rather was included to aid the insurance carrier in investigating, settling, and defending claims. . . . Accordingly, the requirement of notice

in an occurrence policy is subsidiary to the event that invokes coverage, and the conditions relating to giving notice should be liberally and practically construed." (Id, at 406.) The court then stated:

> By contrast, the event that invokes coverage under a "claims made" policy is transmittal of notice of the claim to the insurance carrier. In exchange for limiting coverage only to claims made during the policy period, the carrier provides the insured with retroactive coverage for errors and omissions that took place prior to the policy period. Thus, an extension of the notice period in a "claims made" policy constitutes an unbargained-for expansion of coverage, gratis, resulting in the insurance company's exposure to a risk substantially broader than that expressly insured against in the policy. Obviously, such an expansion in the coverage provided by "claims made" policies would significantly affect both the actuarial basis upon which premiums have been calculated and, consequently, the cost of "claims made" insurance. So material a modification in the terms of this form of insurance widely used to provide professional liability coverage both in this State and throughout the country would be inequitable and unjustified.

(Id. at 406.)

The insurance policy in the instant case is similar to the claims made policy in Zuckerman in that it provides coverage not only for negligent acts committed during the policy period but also provides retroactive coverage for acts committed before the effective date of the policy (except such acts as the insured knew might result in a claim - the same standard exception as approved in Zuckerman). Therefore, instead of the Sparks case, cited by plaintiff, being authority against the defendants' position in the instant case, it is clear that under the Sparks and Zuckerman

cases, read together, the "claims made" policy in the instant case would be upheld by the New Jersey court that decided those cases. In other words, the policy issued to Utah Title would be held not to cover claims made against Utah Title after the policy expired.

Plaintiff alleges that the negligent acts of Utah Title occurred during the policy period, but plaintiff admits that no claim was made against Utah Title until after the policy had expired. Cases in that category (with respect to claims made policies) are collected in Annot., 37 A.L.R. 4th 382 (1985), in §16(a) and §16(b) (pages 457-67) of that Annotation. As seen from the cases collected in §16(b), claims made policies were upheld in cases decided in Arizona, Colorado, Florida, Illinois, Louisiana, Michigan, New Jersey, Ohio, Rhode Island and (in the 1992 Supplement to 37 A.L.R. 4th) California, Massachusetts, Texas, Washington and Wisconsin, and in federal cases construing the laws of Alabama, California, Mississippi and Oregon. In contrast, the "claims made" limitation was held invalid only in cases decided in California, Michigan, New Jersey and New York (collected in §16(a) of that Annotation), but the unusual facts of those minority cases, especially when viewed in light of other decisions in those same jurisdictions, indicate that even those four jurisdictions would uphold a typical claims made policy (the type of policy found in the instant case):

1. The three California cases cited in §16(a) of that A.L.R. Annotation are all based on similar, ambiguous wording present in the claims made policies involved in those cases and not

present in the policy in the instant case. The California policy covered claims which "may be made" against the insured during the policy period instead of the more typical language: "This policy applies to claims first made against the insured during the policy period" as contained in the policy in the instant case. Also, later California cases have upheld claims made policies that did not have that ambiguity in it. (See Burns v. International Ins. Co., 929 F.2d 1422 (9th Cir. 1991) (applying California law); VTN Consol. Inc. v. Northbrook Ins. Co., 92 Cal. App. 3d 888, 155 Cal. Rptr. 172 (Ct. App. 1979).)

2. The Michigan intermediate appellate court decision in Stine v. Continental Cas. Co., 315 N.W.2d 887 (Mich. App. 1982), cited in §16(a) of the A.L.R. Annotation as representing a minority position (upholding coverage even when a claim was not made until after expiration of the policy period) was reversed on appeal to the Michigan Supreme Court, and is, in fact, the same case discussed on pages 9-11 hereof.

3. The New Jersey intermediate appellate court decision in Jones v. Continental Cas. Co., 303 A.2d 91 (N.J. Super.Ct. 1973), cited in §16(a) of that A.L.R. Annotation, dealt with a claims made policy that was very restrictive in its retroactive coverage; it insured prior negligent acts only if "insured by this Company under [a] prior policy." Twelve years later the New Jersey Supreme Court commented that Jones was "the only reported case in which a 'claims made' policy was invalidated because of its lack of retroactive coverage" and that "other state and federal courts

confronted with 'claims made' policies providing limited or no retroactive coverage have declined to follow Jones." (Sparks v. St. Paul Ins. Co., 495 A.2d 406, 410-11 (N.J. 1985).) As discussed above, the later case of Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395 (N.J. 1985), makes it clear that New Jersey would uphold the more typical form of claims made policy (the type involved in the instant case).

4. Finally, the New York case cited in §16(a) of that A.L.R. Annotation, Heen & Flint Assoc. v. Travelers Indemnity Co., 400 N.Y.S.2d 994 (Sup.Ct., Monroe Co., 1977), was a memorandum decision by a single trial court judge, who held that coverage existed (though a claim was not made until after the policy expired) based on the unusual facts of that case - that the insured was not able to obtain continued coverage from his carrier (because the carrier ceased writing professional liability insurance policies in New York) and was not able to obtain a replacement policy from any other carrier with respect to the negligent act in question.

Thus, of all of the cases collected in Annot. 37 A.L.R. 4th 382 (1985), there appears not to be a single case that supports plaintiff's contention in the instant case that Utah Title should be covered under the claims made policy even though plaintiff's claim against Utah Title was not made until after the policy expired.

On pages 10-14 of plaintiff/appellant's Brief, 16 cases are cited. It appears that all of those cases cited by plaintiff

involved an "occurrence" type policy and not a "claims made" policy. That conclusion appears certain for two reasons: (1) the insurance policies involved in those cases did not include any professional liability policies but instead involved life insurance, fire insurance, automobile insurance, public liability insurance for personal injury and a fidelity bond issued to a savings and loan company. In those types of insurance, occurrence policies are typically used. (2) None of those cases dealt with the issue of whether a claims made policy could be held to cover a claim made after the policy expired; in fact, none of those cases even referred to the policy involved as being a claims made policy.

Several of those cases cited by plaintiff held that an insured and his insurer cannot agree between themselves that the policy does not cover a particular claim, and thereby defeat whatever rights an injured party may have to be compensated by insurance proceeds. That situation obviously is not involved in the instant case.

Others of those cases cited by plaintiff dealt with the issue of whether the insured's late notice to the insurance company of the claim would be excused, and some of those cases held that such late notice would not be grounds for denial of coverage under the policy unless the insurance company could show prejudice. But that "notice - prejudice" rule is often not applicable to claims made insurance policies for the following reasons:

1. If the claim against the insured is not made during the policy period, it is immaterial whether or not the insured gave

timely notice of the claim to the insurance company. The claim is still not covered.

2. Many claims made policies provide coverage only for claims where both (1) the claim itself is made against the insured during the policy period and (2) notice of the claim is also given to the insurer during the policy period. In those case the "notice - prejudice" rule has no application. Late notice cannot be excused because, as pointed out in Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395 (N.J. 1985) (discussed on pages 13-16 above), the giving of notice to the insurance company is the actual event that "invokes coverage," as distinguished from an occurrence policy where the notice requirement does not define the coverage but is merely to enable the insurance company to investigate, defend and settle the claim). (See Burns v. International Ins. Co., 929 F.2d 1422, 1425 (9th Cir. 1991), "the 'notice - prejudice' rule does not apply to claims-made policies.")

Finally, even if the "notice - prejudice" rule were held to apply in the instant case, the facts regarding the lack of notice are so egregious that prejudice to the insurance company is clearly enormous.

In summary, virtually unanimous case law has upheld the validity of claims made insurance policies.

B. Public Policy Considerations in Support of Claims Made Policies.

The court in Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395 (N.J. 1985) (discussed on pages 13-16 hereof), reviewed the reasons for the development and increasing use of

claims made policies. "Occurrence" policies, which were once the standard form of insurance, are now ordinarily used with respect to events whose occurrence is usually easy to ascertain and where claims are usually made within a reasonably short time after the event (death, fire, collision, etc.). But occurrence policies present difficult underwriting problems with certain kinds of injuries and the negligence that causes those injuries, which may not be discovered until years after they occur, such as professional malpractice, environmental hazards and defective products. Under an occurrence policy those risks result in a "long tail" of exposure to the carrier, long after the policy expires, and over the years claims have increased in number and amount far beyond what the underwriters could have originally estimated. These problems have led, over the past several decades, to the wide-spread use of "claims made" policies instead of "occurrence" policies with respect to those kinds of risks. (See Zuckerman, supra at 398-401.

One commentator suggested that the use of "claims made" policies has stabilized the insurance market in errors and omissions coverage and that companies attempting to write "occurrence" type policies with respect to errors and omissions insurance have not been able to remain in the marketplace. (D. Shand, "Is Your Policy on a 'Claims Made' Basis?," Weekly Underwriter, Sept. 15, 1973, at 8, quoted in Zuckerman, supra at 400.)

The Zuckerman case details some of the advantages, both

to insureds and to insurance carriers, that claims made policies have over occurrence policies:

> The obvious advantage to the underwriter issuing "claims made" policies is the ability to calculate risks and premiums with greater exactitude since the insurer's exposure ends at a fixed point, usually the policy termination date. . . . This may result in lower rates for the insured. . . . A corollary benefit to the insured is that since coverage is purchased on a contemporary basis, it can afford protection in current dollars for liability that may be based on negligence that occurred years earlier. . . .
>
> Obviously, it is not against the public interest that professional practitioners, for example, doctors, lawyers, engineers, and architects, be able to obtain insurance on a reasonably structured "claims made" basis, rather than being left in the position of being able to obtain insurance only on an "occurrence" basis at what may perhaps be exorbitant rates that few could afford.

(Id. at 399-401.)

In the instant case, if plaintiff's contention were accepted - that a claims made policy should cover claims made after the policy expires, in spite of the specific policy language to the contrary - it would mean that the typical claims made policy issued in this state would be judicially converted into an occurrence policy; in fact it would go further than that because claims made policies (unlike occurrence policies) usually cover past acts of negligence. If claims made policies were then construed to cover future claims also, such policies would be judicially converted into a liability policy broader in coverage than either a claims made or an occurrence policy. Such a result would certainly cause serious repercussions in the insurance industry in this state. It

would be difficult for insurance companies to calculate risks and premiums with any degree of certainty; premium rates would obviously have to be increased, and the future of claims made policies would be uncertain. Even plaintiff/appellant acknowledges that holding claims made policies to be invalid would "have a significant impact on professional insurance coverage in the future." (Appellant's Docketing Statement, page 6.)

With respect to policies already issued - even those which were issued and expired years ago, like the policy in the instant case - the insurance companies would be subject to dramatically increased exposure that they did not anticipate and for which no premium was calculated, and the insureds under those policies (or their judgment creditors) would thus receive a windfall in protection for which the insured did not pay.

On page 21 of plaintiff/appellant's Brief he argues that the claims made policy in the instant case does not have adequate coverage of negligent acts occurring prior to the effective date of the policy because it excludes coverage for claims, and for negligent acts that might result in claims, that the insured knows about at the time he applies for the insurance. But that is a standard provision in a claims made policy, and plaintiff points to no case where a court has objected to that clause or held a claims made policy to be invalid because of it. (See e.g., Zuckerman v. National Union Fire Ins. Co., 495 A.2d 395 (N.J. 1985), where that "knowledge of prior negligence" clause is approved.)

If persons who render professional services and who

become aware of claims which are about to be asserted against them, have the right to run out and buy insurance that will pay to defend them and to indemnify them from those claims, it would be tantamount to persons who find they are terminally ill then buying a large amount of life insurance. The insurance industry could go broke quickly if it was forced to write that kind of business.

In summary, claims made policies fill an important need to provide insurance for professional malpractice, and public policy considerations would indicate that such policies should be upheld and should continue to be available in the marketplace.

C. Cases Dealing With Statutes of Repose and The Open Courts Provision of the Utah Constitution Are Inapplicable.

Plaintiff attempts to make up for its lack of any direct case authority by the novel argument that a claims made insurance policy is similar to a statute of repose and should be held unconstitutional under Article I, Section 11 of the Utah Constitution (the "open courts" clause) and under the case of Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), and other Utah cases which have applied the open courts clause. The Berry case held a statute of repose under the Utah Products Liability Act to be unconstitutional under the Utah open courts clause. Plaintiff also cites Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989), which held a statute of repose for architects and builders to be unconstitutional under the Utah open courts clause, and Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989), which held that a statute limiting damages, as applied

for the benefit of University Hospital, was unconstitutional under the open courts clause.

The statute of repose cases dealt with the issue of whether a cause of action could constitutionally be barred by a statute that bars an action after a specified time where that time begins to run from some event other than the injury that gives rise to the cause of action. For example, the statute of repose dealt with in the Berry case purported to bar an action, regardless of when the injury from a defective product occurred, if the action was not brought within six years of the initial purchase of the product and within 10 years of the date of its manufacture.

In contrast to a statute of repose issue (whether a party who has a cause of action may be barred from commencing a suit to pursue his cause of action), plaintiff in the instant case never had a cause of action against the defendants for the simple reason that plaintiff's claim against Utah Title was not made within the policy period and was not, therefore, covered by the policy.

These statute of repose cases and the open courts clause therefore have no applicability to the instant case.

III. THERE IS NO COVERAGE UNDER THE POLICY BECAUSE NOTICE OF THE CLAIM WAS NOT GIVEN TO THE INSURED AS REQUIRED BY THE POLICY.

As a separate and independent ground, summary judgment was granted to defendants because they were prejudiced by not having been provided with timely notice of plaintiff's claim against Utah Title as required by the policy. (Order and Judgment

of the trial court, Record at 169-170.)

That judgment should be affirmed based on the holding in Busch Corp. v. State Farm Fire & Cas. Co., 743 P.2d 1217 (Utah 1987). That case is squarely in point with the facts of the instant case, even including the context in which the case came to the Supreme Court (an appeal from a summary judgment in favor of the defendant insurance company).

In Busch, State Farm issued a liability insurance policy in 1980 to plaintiff, a land developer. That same year plaintiff was sued for damages it had caused in 1978 to land adjacent to one of its developments. The case was tried to a jury, and in 1982 a $29,000 judgment was entered against plaintiff. In 1983 plaintiff, for the first time, notified State Farm of the claim and demanded indemnity under the policy. Thus notice to State Farm was not given until five years after the negligent act occurred, three years after the lawsuit had been filed against plaintiff, and not until after the suit had been tried and a judgment rendered. State Farm declined coverage under its policy because plaintiff had not complied with the notice requirement of the policy, which stated:

> In the event of an occurrence, written notice . . . shall be given by or for the Insured to the Company . . . as soon as practicable.
>
> If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

(743 P.2d at 1218.) (That language is virtually identical to the policy language in the instant case, quoted in paragraph 5 under

the "Statement of Facts" section above.)

The trial court granted State Farm's motion for summary judgment, and on appeal the Supreme Court affirmed, stating that, "Clearly, under the facts of this case, written notice was not given to defendants as soon as practicable" as required by the policy. (743 P.2d at 1218.) Plaintiff in that case argued that despite its failure to comply with the notice provisions of the policy, the case should not have been dismissed unless the insurance company showed that actual prejudice resulted from the lack of notice. The court's response was that, regardless of whether actual prejudice need be shown (an issue the court chose not to decide), such prejudice was amply shown in the facts, established by the affidavit of State Farm's claims manager, that because of the late notice the insurance company had not had the opportunity to investigate and possibly settle the claim or to employ its own counsel to defend the lawsuit.

The facts of the instant case are even more onerous and prejudicial to the defendant insurance company than in the Busch case. Here the insurance company never did receive notice of the claim from its insured (most likely because the insured, Utah Title, knew that the two policies had expired before plaintiff made a claim against Utah Title). The notice the insurance company eventually got was from the insured's judgment creditor, the plaintiff in this action, but that notice was not given until (1) more than 10 years after the negligent act giving rise to the claim, (2) over eight years after the claim was made, (3) after

eight years of litigation had ensued, and (4) five months after judgment had been entered against the insured. And as stated by George Grulke, the claims manager for Shand Morahan, in his affidavit filed in support of defendants' motion for summary judgment:

> Because of the absence of any notice to Shand Morahan until June 1988, Mutual Fire and Shand Morahan were deprived of the opportunity to do the kinds of things that we routinely do in handling claims or to be involved in any way in the claim of AOK Lands. We had no opportunity to review the claim, to examine the documents that Utah Title was alleged to have been negligent in handling or drafting, to interview and take statements of witnesses, to review issues of insurance coverage of Utah Title, to adjust and possibly settle the claim, to retain an attorney to represent Utah Title in the law suit filed by AOK Lands, or to participate in any way in the defense of that suit.

(Paragraph 8 of Mr. Grulke's Affidavit; Record at 77, 80.) A copy of Mr. Grulke's Affidavit is attached in the Addendum hereto.

It is hard to imagine a more extreme case of non-compliance with the notice provision of the insurance agreement and of prejudice to the insurance company, and the trial court in the instant case accordingly found that the defendants were prejudiced by not having been provided with timely notice of plaintiff's claim against Utah Title. (Order and Judgment of the trial court, Record at 169-70.) There was therefore no coverage under either policy because the coverage was expressly conditioned upon claims being promptly reported.

Plaintiff/appellant states that "the transcript of the lower court's decision" attached to his Brief "demonstrates that

Judge Stanton M. Taylor did not give any serious considerations to the legal or factual issues raised in the lower court. Plaintiff also claims that the lower court "failed to give the appellant an opportunity to discover whether or not the insurance company had received constructive or actual knowledge of the claim which was filed by the appellant against Utah Title." (Plaintiff/appellant's Brief at 14.) Those statements are without support in the record as indicated by the following:

1. The hearing before the trial court continued for probably 20 to 30 minutes or longer, yet plaintiff/appellant has elected to obtain and file with its Brief a partial transcript of only the last three or four minutes of that hearing. That is not adequate to indicate what the trial court did or did not consider.

2. At the time of the trial court hearing on August 19, 1991, on defendants' summary judgment motion, the court had before it the extensive memorandums of defendants and of plaintiff in support of and in opposition to, respectively, defendant's motion for summary judgment. (Record at 28 [Memorandum in Support of Defendants' Motion for Summary Judgment], 86 [Plaintiff's Memorandum in Response], and 117 [Defendants' Reply Memorandum].)

3. The Order and Judgment of the trial court stated that the court had considered the various memorandums and affidavits, "the pleadings and record in this case and the arguments of counsel" (Record at 169), and there is nothing in the record to indicate that Judge Taylor did not duly consider those matters.

4. Neither at the trial court nor in this appeal has

plaintiff pointed to anything in the record that controverts any of the facts set forth by defendants in their Memorandum in Support of Defendants' Motion for Summary Judgment and set forth by defendants in the Statement of Facts in this Brief.

5. Plaintiff also made no request at the hearing before the trial court for more time to develop any further facts pursuant to Rule 56(f) of the Utah Rules of Civil Procedure.

6. Even in Appellant's Brief before this court it has specifically admitted facts sufficient to justify the rendering of summary judgment against appellant, including the following:

a. The last of the two claims made insurance policies issued by defendants to Utah Title expired February 5, 1978. (Appellant's Brief at 7.)

b. "The insurance policy specifically informed the insured, Utah Title. . . . that no claims made after the policy period which concluded on February 5, 1978, were covered by the insurance policy." (Appellant's Brief at 9.)

c. Plaintiff did not even learn of Utah Title's negligence until the summer of 1979 (over 16 months after the claims made policy expired) and did not file suit against Utah Title until November or December 1979 (21 or 22 months after the latter of the two claims made policies expired). (Appellant's Brief at 4, 9.)

d. After extensive litigation and five weeks of a bifurcated trial, plaintiff obtained judgment against Utah Title in January 1988. (Appellant's Brief at 2, 4.)

e. Plaintiff notified defendants of the judgment in June 1988. (Appellant's Brief at 2, 6, 12.)

It is hard to imagine a case where there is so clearly no dispute as to the material facts, and if it appeared to plaintiff that Judge Taylor did not immerse himself in factual issues, it is probably because plaintiff never raised any factual issues.

Plaintiff argues that the defendant insurance company is not prejudiced by failure to receive notice of plaintiff's claim against Utah Title and of the ongoing litigation between plaintiff and Utah Title because the "trial of the action between Utah Title and the appellant and the discovery conducted thereunder, should provide sufficient information to the appellees in the form of documentation, depositions, witnesses' testimony on record, etc." (Plaintiff/appellant's Brief at 14-15.) In other words, plaintiff is arguing that the insurance company is not prejudiced because even now, at this late date, it can go back and read the depositions and the transcript of the two trials that were held and find out all it wants to about what happened in the case! The fallacy of that argument is self evident. Is plaintiff suggesting that the defendant insurance company should now be able to go back and litigate with plaintiff in the present action the issue of whether Utah Title was negligent? Certainly plaintiff is not conceding that. Plaintiff's argument would effectively eliminate from insurance policies the provisions that insurance companies are entitled to notice of claims made against their insureds.

On page 11 of plaintiff/appellant's Brief he argues that,

"The 'no action' clause of the insurance policy contradicts any notice of claim requirements." It does not follow that just because the insurance company could not be sued directly until a judgment was obtained against its insured, that somehow excuses the insured from having never given notice of the claim to its insurance company during all those years when plaintiff's claim against the insured was being litigated in the trial court.

On page 12 of plaintiff/appellant's Brief, it argues that, "The appellant should not be penalized for Utah Title's failure to give notice as required under the insurance policy at issue. In fact, Utah Title had specifically represented to the appellant that it had no insurance coverage."

If Utah Title did so represent, they would have made that representation in good faith (and correctly). They had no insurance coverage because they had had a claims made policy, and they would obviously have known that the plaintiff's claim against them was not made during the policy period. Plaintiff itself acknowledges that Utah Title was "specifically informed" by the insurance policy itself "that no claims made after the policy period which concluded on February 5, 1978, were covered by the insurance policy." (Plaintiff/appellant's Brief at 9, last paragraph.)

CONCLUSION

The material facts are without dispute. This is a case that must be decided as a matter of law.

With summary judgment in this case having been granted on each of two separate grounds (prejudicial failure to give notice to defendants of the claim, and the claim not having been made until after the "claims made" policy expired), in order to reverse the trial court's granting of summary judgment, this court would, therefore, have to both: (1) overrule the Busch case (discussed on pages 26-27 hereof) on the issue of lack of notice, and (2) go against the virtually unanimous weight of authority by invalidating "claims made" insurance policies and thereby create a risk of serious disruption to the business of providing malpractice insurance to professionals.

There is not only no genuine issue as to any material fact in this case, but there also appears to be no issue as to the controlling legal principles. The summary judgment granted to defendants should be affirmed.

DATED this 3rd day of November, 1992.

CHRISTENSEN, JENSEN & POWELL, P.C.

By Richard L. Evans
Richard L. Evans
Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November, 1992, ten copies of the Brief of Appellees have been mailed, postage prepaid, addressed to the following:

Utah Supreme Court
332 State Capitol Building
Salt Lake City, Utah 84114

and that four copies of the Brief of Appellees have been mailed, postage prepaid, addressed to the following:

Robert A. Echard
Key Bank Building, Suite 200
2491 Washington Boulevard
Ogden, Utah 84401

Richard D. Nunn

ADDENDUM

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

AOK LANDS, INC., Plaintiff, vs. SHAND, MORAHAN & COMPANY, and MUTUAL FIRE, MARINE & INLAND INSURANCE CO., Defendants.	ORDER AND JUDGMENT SEP 11 1991 Civil No. 890903067CV Judge Stanton M. Taylor

The motion for summary judgment of defendants Shand, Morahan & Company ("Shand Morahan") and Mutual Fire, Marine & Inland Insurance Co. ("Mutual Fire") came on regularly for hearing before the court on August 19, 1991. Richard L. Evans of the firm of Christensen, Jensen & Powell appeared at the hearing as attorney for the defendants, and Robert A. Echard of the firm of Gridley, Echard & Ward appeared as attorney for the plaintiff. The court, having considered the motion and the memoranda and affidavit filed in support thereof, having considered the memorandum and affidavits filed in opposition to the motion, having considered the pleadings and record in this case and the arguments of counsel, being fully

advised and having heretofore directed this order,

The court finds that there is no genuine issue as to any material fact and that said defendants are entitled to judgment as a matter of law on both of the grounds set forth in defendants' motion: (1) that plaintiff's claim against Utah Title, the former insured, was not made until after the "claims made" insurance policies issued by or on behalf of defendants had expired and that said claim was therefore not covered under the policies, and (2) that defendants were prejudiced by not having been provided with timely notice of plaintiff's claim against Utah Title as required by the policies and that said claim was, for that reason also, not covered by the policies.

IT IS THEREFORE ORDERED AND ADJUDGED that defendants' motion for summary judgment against plaintiff be, and the same hereby is, granted, and all claims of plaintiff asserted against defendants Shand Morahan and Mutual Fire as set forth in the complaint are hereby dismissed with prejudice.

DATED this 11 day of ~~August~~, 1991.

BY THE COURT:

Stanton M. Taylor
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 1991, a copy of the foregoing Order and Judgment was mailed, postage prepaid, to the following:

Robert A. Echard
Gridley, Echard & Ward
635 - 25th Street
Ogden, Utah 84401

Richard L. Evans

Richard L. Evans, jr., #1016
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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

MAY 20 1991

AOK LANDS, INC.,	:	
	:	AFFIDAVIT OF
Plaintiff,	:	GEORGE M. GRULKE
	:	IN SUPPORT OF DEFENDANTS'
vs.	:	MOTION FOR SUMMARY
	:	JUDGMENT
SHAND, MORAHAN & COMPANY, and	:	
MUTUAL FIRE, MARINE & INLAND	:	Civil No. 890903067CV
INSURANCE CO.,	:	
	:	
Defendants.	:	

STATE OF ILLINOIS :

COUNTY OF COOK :

George M. Grulke, being first duly sworn on oath, deposes and says:

1. I am Claims Manager and Coordinator, Mutual Fire Claim Unit at Shand, Morahan & Company, Inc. ("Shand Morahan") whose address is Shand Morahan Plaza, Evanston, Illinois 60201.

2. Shand Morahan provides, subject to underwriting management contracts, the management of special risk and professional liability lines of business for various insurers. This includes underwriting and claims handling.

3. During the period of time beginning March 4, 1971 and continuing through December 31, 1990, Shand Morahan acted as the

underwriting manager for Mutual Fire, Marine & Inland Insurance Company ("Mutual Fire") with respect to the line of special risk business under which the two errors and omissions insurance policies involved in this case were issued to Utah Title & Abstract Company ("Utah Title"). Those are policy No. CN 502107 covering the period from February 5, 1976 to February 5, 1977, and policy No. CN 502852 for the period from February 5, 1977 to February 5, 1978. As part of Shand Morahan's duties as underwriting manager, Shand Morahan handled, on behalf of Mutual Fire, claims made against entities insured by Mutual Fire, and until Shand Morahan's role as underwriting manager for Mutual Fire ended on December 31, 1990, part of my duties for Shand Morahan was to receive, review and evaluate initial loss notices, review coverage, establish claim files based upon loss reports received; arrange for appropriate investigation, defense and disposition of the claims.

4. Because of Shand Morahan's role in handling claims, a provision was typically included in the "declarations" page of Mutual Fire policies, subject to the terms and conditions of the Underwriting Management Agreement between Shand Morahan and Mutual Fire, to the effect that all claims were to be reported directly to Shand Morahan, and giving Shand Morahan's address, and such a provision does, in fact, appear in the declarations page of each of the two policies involved in this case (referred to in paragraph 3 above). However, even in those instances where insureds under Mutual Fire policies would overlook that provision and would send notices of claims made against them directly to Mutual Fire, the

routine practice between Shand Morahan and Mutual Fire was that Mutual Fire would forward those notices of claims to Shand Morahan for handling.

5. Consistent with the terms and conditions of the Underwriting Management Agreement, handling claims for Mutual Fire was a regularly conducted business activity of Shand Morahan. As part of that business activity I and other persons who worked with me and under my direction regularly and promptly kept records relating to claims made against Mutual Fire insureds, and we relied upon those records in performing our duties to see that claims were properly handled. Those records included notices received by Shand Morahan of claims made against Mutual Fire insureds, resulting investigations, correspondence, settlements, court proceedings and various other matters relating to said claims.

6. I have reviewed Shand Morahan's claims records with respect to the two errors and omissions policies issued to Utah Title, as referred to in paragraph 3 above. I find that the first notice or information of any kind received by Shand Morahan with regard to the claim made by plaintiff, AOK Lands, Inc. ("AOK Lands") against Utah Title was a letter dated June 3, 1988 from Robert A. Echard, attorney for AOK Lands, to Shand Morahan. In that letter Mr. Echard informed Shand Morahan that, on behalf of AOK Lands, he had filed a complaint against Utah Title in 1979 and had obtained a $400,000 judgment against Utah Title and demanded that we pay the policy limits towards that judgment. That judgment, a copy of which he enclosed with that June 3, 1988

letter, was dated January 15, 1988, and it recited that two jury trials had been held.

7. Thus, even though the claim of AOK Lands had apparently been made against Mutual Fire's insured, Utah Title, in 1979, our records indicate that Shand Morahan did not receive any notice of that claim from Utah Title or from AOK Lands or from anyone else until more than eight years later, after two trials had been held and a $400,000 judgment had been entered.

8. Because of the absence of any notice to Shand Morahan until June 1988, Mutual Fire and Shand Morahan were deprived of the opportunity to do the kinds of things that we routinely do in handling claims or to be involved in any way in the claim of AOK Lands. We had no opportunity to review the claim, to examine the documents that Utah Title was alleged to have been negligent in handling or drafting, to interview and take statements of witnesses, to review issues of insurance coverage of Utah Title, to adjust and possibly settle the claim, to retain an attorney to represent Utah Title in the lawsuit filed by AOK Lands, or to participate in any way in the defense of that suit. As a result of the preceding, it was impossible for us to conduct an investigation, engage counsel to defend the allegations of the complaint and, as such, it was prejudicial to the interest of Shand Morahan and Mutual Fire.

Dated this 16th day of May, 1991.

Sonya M. Grulke

Subscribed and sworn to before me this 16th day of May, 1991.

Carl Schulz Jr.
Notary Public

My Commission expires:

" OFFICIAL SEAL "
CARL SCHULZ JR.
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 5/1/93

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Affidavit of George M. Grulke in Support of Defendants' Motion for Summary Judgment has been mailed, postage prepaid, addressed to the following this 17th day of May, 1991:

Robert A. Echard
Gridley, Echard & Ward
635 25th Street
Ogden, Utah 84401

Susan Perry